sustained commitment to seek out and prevent the transfer to Iran of goods, services, and technology that could make a material contribution to the development of nuclear, biological, or chemical weapons, or of ballistic or cruise missile systems; and

(C) no entity under the jurisdiction or control of the Government of the Russian Federation, has, during the 1-year period prior to the date of the determination pursuant to section 6(b) of such Act, made transfers to Iran reportable under section 2(a) of the Act.

(6) On June 29, 2005, President George W. Bush issued Executive Order 13382 blocking property of weapons of mass destruction proliferators and their supporters, and used the authority of such order against 4 Iranian entities, Aerospace Industries Organization, Shahid Hemmat Industrial Group, Shahid Bakeri Industrial Group, and the Atomic Energy Organization of Iran, that have engaged, or attempted to engage, in activities or transactions that have materially contributed to, or pose a risk of materially contributing to, the proliferation of weapons of mass destruction or their means of delivery (including missiles capable of delivering such weapons), including efforts to manufacture, acquire, possess, develop, transport, transfer, or use such items.

SEC. 3. AMENDMENTS TO IRAN NONPROLIFERATION ACT OF 2000 RELATED TO INTERNATIONAL SPACE STATION PAYMENTS.

(a) TREATMENT OF CERTAIN PAYMENTS.—Section 7(1)(B) of the Iran Nonproliferation Act of 2000 (Public Law 106–178; 50 U.S.C. 1701 note) is amended by inserting after ''such date'' the following: '', except that such term does not mean payments in cash or in kind made or to be made by the United States Government, to meet the obligations of the United States under the Agreement Concerning Cooperation on the Civil International Space Station, with annex, signed at Washington January 29, 1998, and entered into force March 27, 2001, or any protocol, agreement, memorandum of understanding, or contract related thereto, to January 1, 2012''.

(b) REPORTING REQUIREMENTS.—Section 6 of such Act is amended by adding at the end the following new subsection:

''(i) REPORT ON CERTAIN PAYMENTS RELATED TO INTERNATIONAL SPACE STATION.—

''(1) IN GENERAL.—The President shall, together with each report submitted under section 2(a), submit to the Committee on Foreign Relations of the Senate and the Committee on International Relations of the House of Representatives a report that identifies each Russian entity or person to whom the United States Government has, since the date of the enactment of the Iran Nonproliferation Amendments Act of 2005, made a payment in cash or in kind to meet the obligations of the United States under the Agreement Concerning Cooperation on the Civil International Space Station, with annex, signed at Washington January 29, 1998, and entered into force March 27, 2001, or any protocol, agreement, memorandum of understanding, or contract related thereto.

''(2) CONTENT.—Each report submitted under paragraph (1) shall include—

''(A) the specific purpose of each payment made to each entity or person identified in the report; and

''(B) with respect to each such payment, the assessment of the President that the payment was not prejudicial to the achievement of the objectives of the United States Government to prevent the proliferation of ballistic or cruise missile systems in Iran and other countries that have repeatedly provided support for acts of international terrorism, as determined by the Secretary of State under section 620A(a) of the Foreign Assistance Act of 1961 (22 U.S.C. 2371(a)), section 6(j) of the Export Administration Act of 1979 (50 U.S.C. App. 2405(j)), or section 40(d) of the Arms Export Control Act (22 U.S.C. 2780(d)).''.

Mr. BENNETT. I thank the Chair. I now yield the floor so that the Senator from Massachusetts can make his statement.

The PRESIDING OFFICER. The Senator from Massachusetts is recognized.

Mr. KENNEDY. Mr. President, I thank the chairman of the committee and the Senator from Utah for his courtesies. I know he is eager to get on with the legislation, and I am particularly grateful to him for the courtesy that he has extended this morning.

NOMINATION OF JOHN ROBERTS

Mr. KENNEDY. Mr. President, our Founders proclaimed the bedrock principle that we are all created equal. But everyone knows that when we started, the reality was far different. For more than two centuries, we have struggled, sometimes spilling precious blood, to fulfill that unique American promise. The goals, the principles, and the sacrifices of millions of Americans breathed an ever-fuller life into our constitutional ideals.

The Constitution itself has been the inspiration for this march of progress. The open-ended principles that our Founders had the wisdom to bequeath us have acquired ever-deepening meaning over the years—a remarkably steady movement toward greater protection for individual rights and liberties, and an increasing assurance that governments at all levels have the authority to defend ordinary Americans from overreaching by those who would discriminate against them or exploit them.

We have made much progress. But our work is not finished, and we still look to our elected representatives and our independent courts to uphold those founding principles in each new generation, to continue the great march of progress, to never turn back and never give up our hard-won gains.

This was the basic issue in our hearings on the nomination of John Roberts to become our next Chief Justice. Would he bring to that high office the values and ideals that would enable our struggle for equality and opportunity for all to continue, or would he stand in the way?

The only records made available to us were those of John Roberts as an aggressive activist in the Reagan administration, eager to limit basic values that we have achieved at great cost and sacrifice over the years, especially in basic areas such as voting rights, women's rights, civil rights, and disability rights. He is an outstanding lawyer who says he could represent clients on any side of a question. As Congressman JOHN LEWIS eloquently stated in our hearings, 25 years ago, John Roberts was on the wrong side of the Nation's struggle to achieve genuine equality of opportunity for all Americans. Now, we need to know which side he is on today. We need to know that as Chief Justice of the United States, his sole client would be all the American people.

John Roberts is a highly intelligent nominee. He has argued 39 cases before the Supreme Court and won more than half of them. He is adept at turning questions on their head while giving seemingly appropriate answers. These skills served him well as a Supreme Court advocate. These same skills, however, did not contribute to a reasonable confirmation process. At the end of the 4 days of hearings, we still know very little more than we knew when we started.

In answer to another question about his views, he stated again:

> I will confront issues in this area as I would confront issues in any area, . . . and that would be to fully and fairly consider the arguments presented and decide them according to the rule of law.

In yet another instance, he proclaimed:

> The responsibility of the judicial branch is to decide particular cases that are presented to them in this area according to the rule of law.

And again:

> I became a lawyer or at least developed as a lawyer because I believe in the rule of law.

The rule of law—everyone in the Senate agrees with that. In fact, we have each taken an oath of office to protect and defend the Constitution, and we take that oath seriously. But it reveals little about how we will vote on the important questions of the day, and what values and ideals we bring to our decisions.

Judge Roberts said that a judge should be like an umpire, calling the balls and strikes but not making the rules.

But we all know that with any umpire, the call may depend on your point of view. An instant replay from another angle can show a very different result. Umpires follow the rules of the game. But in critical cases, it may depend on where they are standing when they make the call.

The same holds true of judges.

As Justice Oliver Wendell Holmes famously stated:

> The life of the law has not been logic; it has been experience.

As Justice Stephen Breyer offered in his confirmation hearing:

> I always think law requires both a heart and a head. If you do not have a heart, it becomes a sterile set of rules, removed from human problems, and it will not help. If you do not have a head, there is the risk that in trying to decide a particular person's problem in a case that may look fine for that person, you cause trouble for a lot of other people, making their lives yet worse.

The rule of law is not some mathematical formula for meting out justice. It is our values and ideals that give it real meaning in the case of the Constitution, not our personal values and ideals but our values and ideals, derived from the meaning of the constitutional text.

We all believe in the rule of law. But that is just the beginning of the conversation when it comes to the meaning of the Constitution. The Constitution of Justice Scalia and Justice Thomas is a very different document from the Constitution of Justice Stevens and Justice Souter. Everyone follows the same text. That is the rule of law. But the meaning of the text is often imprecise. You must examine the intent of the Framers, the history, and the current reality. And this examination will lead to very different outcomes depending on each Justice's constitutional world view. Is it a full and generous view of our rights and liberties and of government power to protect the people, or a narrow and cramped view of those rights and liberties and the government's power to protect ordinary Americans?

Based on the record available, there is clear and convincing evidence that Judge Roberts' view of the rule of law would narrow the protection of basic voting rights. The values and perspectives displayed over and over again in his record cast large doubts on his view of the validity of laws that remove barriers to equal opportunity for women, minorities, and the disabled. His record raises serious questions about the power of Congress to pass laws to protect citizens in matters that they care about.

In fact, there is nothing in the record to indicate otherwise. For all the hoopla and all the razzle-dazzle, the record is no different in its bedrock substance than it was the day the hearings started.

When Senator KOHL and others asked Judge Roberts whether he would disavow any of the positions he took over the years, he refused to do so. On the first day of the hearing, Senator KOHL asked, ''Which of those positions were you supportive of, or are you still supportive of, and which would you disavow?'' in order to try to determine what his views are today. Judge Roberts never provided a clear response.

In the area of voting rights, he has a long and detailed record of strong opposition to section 2 of the Voting Rights Act, which is widely acknowledged by scholars and civil rights experts to be one of the most powerful and effective civil rights laws ever enacted. It outlaws voting practices that deny or dilute the right to vote based on race, national origin, or language minority status—and is largely uncontroversial today. Before it was passed, there had not been a single African American elected since Reconstruction from seven of the Southern States with the greatest of African-American populations.

But in 1981 and 1982, Judge Roberts was one of a small group of attorneys in the Justice Department urging the administration to oppose a strong section 2, which allowed discrimination to be proved by demonstrating its results, not just its intent. Although Judge Roberts sought to characterize his opposition to this critical amendment as simply following the policy of the Reagan administration, the dozens of memos he wrote on this subject show that he personally believed the administration was right to oppose the ''effects test.''

In fact, he pressed to keep others from changing their minds about opposing the law. When the Assistant Attorney General for the Civil Rights Division Brad Reynolds raised concerns about sending the Senate a letter on this issue, John Roberts urged the Attorney General to send it, stating that ''my own view is that something must be done to educate the Senators on the seriousness of this problem. . . .'' Of course, the problem he saw was the amendment, not the discrimination it was designed to end.

He also urged the Attorney General to assert his leadership against the amendment to section 2. He wrote that the Attorney General should ''head off any retrenchment efforts'' by the White House staff who were inclined to support the amendment. He consistently urged the administration to require voters to bear the heavy burden of proving discriminatory intent in order to overturn practices that locked them out of the electoral process.

Judge Roberts clearly knew that his position would make it harder for voters to overturn restrictive voting laws. As he wrote at the time, ''violations of section 2 should not be made too easy to prove. . . .'' That was his quote, remember, when he wrote this there were no African Americans elected to Congress from the States with the largest Black populations, and only 18 in Congress overall. And there were only 6 Latinos in Congress. There is no indication in any of his writings on the Voting Rights Act that he was the least bit troubled by this obvious discrimination.

The year after section 2 was signed into law, Judge Roberts wrote in a memo to the White House counsel that ''we were burned'' by the Voting Rights Act legislation, even though it was signed by President Ronald Reagan.

Given his clear record of hostility to this key voting rights protection, the public has a right to know if he still holds these views. But Judge Roberts gave us hardly a clue.

When I asked him if he holds these views today, he refused to answer. He repeatedly tried to characterize his views as the views of the administration. He declined to say whether he agreed with them—then or now. That answer strains credibility, when the memos themselves declare: ''my own view is that something must be done. . . .''

In fairness, he did concede that he no longer believes that section 2 is, to use his words from the 1980s, ''constitutionally suspect.'' But the fact that it took almost 20 minutes for him to provide this obvious answer to a straightforward yes-or-no question is not reassuring.

Both Senator FEINGOLD and I tried to find out whether he came to agree with the strengthened Voting Rights Act after President Reagan signed it into law.

Even when Senator FEINGOLD asked whether Judge Roberts would acknowledge today that he had been wrong to oppose the effects test, he refused to give a yes-or-no answer.

Senator FEINGOLD asked:

> What I'm trying to figure out is, given the fact that you've followed this issue for such a long time, I would think you would have a view at this point about . . . whether the department was right in seeking to keep the intent test or whether time has shown that the effects test is really the more appropriate test.

Judge Roberts responded:

> I'm certainly not an expert in the area and haven't followed and have no way of evaluating the relative effectiveness of the law as amended or the law as it was prior to 1982.

So we still don't know whether he supports the basic law against voting practices that result in denying voting rights because of race, national origin, or language minority status.

You don't need to be a voting rights expert to say we are better off today in an America where persons of color can be elected to Congress from any State in the country, as opposed to the America of 1982, in which no African American had been elected to Congress since Reconstruction from Mississippi, Florida, Alabama, North Carolina, South Carolina, Virginia, or Louisiana, because restrictive election systems effectively denied African Americans and other minorities the equal chance to elect representatives of their choice. In these States, African Americans were a third or more of the population, but they were effectively blocked from electing any candidate of their choice decade after decade throughout the 20th century.

Yet Judge Roberts repeatedly refused to give even this simple reassurance about the act. Is that what he means by the rule of law?

Another very important area in which Judge Roberts refused to disavow his long history of opposition to civil rights is the prevention of discrimination by recipients of Federal funds. These laws were adopted because, Congress believed, as President Kennedy said in 1963, that ''[s]imple justice requires that public funds, to which all taxpayers . . . contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in . . . discrimination.'' As an assistant to Attorney General William French Smith, John Roberts argued that these important laws should be narrowed.

In fact, his position was even more extreme than the Reagan administration's. In 1981, he supported a recommendation to exempt institutions from civil rights laws if the only Federal financial assistance they received was in the form of loans to their students. Under this view, the enormous subsidies the Federal Government

gives to colleges and universities in the form of Federal financial aid would not have been enough to require them to obey the laws against discrimination. Can you imagine that? Those were just the type of things that President Kennedy was addressing. These are the universities, the colleges that are getting all this help and assistance from grants and loans which are essential to the running of it. He said oh, no, we are going to have to look at the other requirements. Because they get all these loans, it is still done meaning they have to conform to the nondiscrimination, title XI, the women, on hiring on race or the disabled. Let me continue.

At many private institutions, financial assistance to students was the only form of Federal aid, so Judge Roberts' suggestion would have left those institutions largely free to discriminate against women, the disabled, and minorities in both education and hiring.

In fact, Judge Roberts's position was so extreme that it was rejected by the Reagan administration and later by the Supreme Court. But in his testimony, Judge Roberts ignored this aspect of his record. He refused even to acknowledge that his past positions had gone beyond the administration's. Instead, he stated repeatedly that he was just doing his job.

He said:

> I was articulating and defending the administration's position. . . . The position that the administration advanced was the one I just described. The universities were covered due to Federal financial assistance to their students. It extended to the admissions office.

That is an accurate statement of the administration's position but the view Judge Roberts advanced in his December 8, 1981, memo was quite different.

I also asked whether he still agreed with the statement he made in 1985, that ''[t]riggering coverage of an institution on the basis of its accepting students who receive Federal aid is not too onerous if only the admissions office is covered. If the entire institution is to be covered, however, it should be on the basis of something more solid than Federal aid to the students.''

Again and again, Judge Roberts refused to say whether he still agrees with those words. He said only, ''Well, Senator, the administration policy was as I articulated it. And it was my job to articulate the administration policy.''

That is no answer at all. I never asked about the policy of the Reagan administration. I asked only whether today, he still believed, or would disavow, his earlier position. Given his repeated refusal to answer, I can only conclude that he still holds those views today, given his failure to respond.

In other words, his position was the following: It really doesn't make a difference, if a university is getting financial aid through grants or through loans, that they can go ahead and discriminate if they are not going to discriminate in the admissions office. So if they do not discriminate in the admissions office, then they can discriminate in the other areas of the university.

That happened to be the holding in the Grove City case. The question was: Was that what the Congress meant when it said we were not going to provide funds and permit any entities to discriminate? The overwhelming majority in the House and the Senate said: That is what we intended. If they are going to get this aid and assistance through college loans and grants, they can't discriminate against women in sports, against hiring of black professors or against the disabled, overwhelmingly.

Not Judge Roberts, no, no. He wanted it program specific.

Say they had 15 in the admissions office, and if they didn't discriminate based on race, disability or against women, it doesn't make any difference what the rest of the university did.

That position was absolutely, completely rejected by the administration and overwhelmingly in a bipartisan way. We asked Judge Roberts now what his position still was on this issue, and we could not get an answer.

In addition, in response to questions from Senator BIDEN, Judge Roberts refused to say he no longer agrees with his former position that laws against discrimination should be narrowly interpreted to apply only in the parts of the institution that directly receive Federal funds. Under this view, a college that received Federal financial assistance through its admissions office could not discriminate in admissions, but it could discriminate in every other aspect of its operations—in hiring teachers, in instructing students, and in athletics. When Senator BIDEN reminded Judge Roberts that he had written in 1982 that he ''strongly agreed'' with this view, Judge Roberts never said he no longer holds that position. Instead he testified under oath, ''So if the view was strongly held, it was because I thought that was a correct reading of the law.'' Is that his view of the rule of law?

Another very important area in which Judge Roberts failed to give any reassurance was his position protecting women and girls against discrimination in educational programs under title IX. In the case of Franklin v. Gwinnett County, in 1991, Judge Roberts argued that title IX did not allow a high school girl who had been sexually abused by her teacher to recover damages. Judge Roberts' argument would have left the victim with no remedy at all.

Senator LEAHY asked him, ''Do you now personally agree with and accept as binding law the reasoning of Justice White's opinion in Franklin v. Gwinnett?'' Judge Roberts replied that, ''It certainly was a precedent of the court that I would apply under principles of stare decisis.''

That answer sounds reassuring, until you realize that Judge Roberts never answered whether he personally agreed with this unanimous decision of the Court.

Senator LEAHY offered Judge Roberts several chances to disavow his position in the Franklin case. He asked, ''Do you now accept that Justice White's position [in Franklin v. Gwinnett County] was right and the government's position was wrong?'' Judge Roberts replied again, ''I certainly accept the decision of the court—the 9 to 0 decision, as you say—as a binding precedent of the court. Again, I have no cause or agenda to revisit it or any quarrel with it.''

That also sounded reassuring, until I recalled that Justice Thomas repeatedly used the same words—''I have no quarrel with it''—to evade answers during his nomination hearing. Justice Thomas testified, for instance that he had ''no quarrel'' with the test established by the Supreme Court in the Lemon v. Kurzman case for analyzing claims under the first amendment's prohibition on the establishment of religion. But just 2 years later, Justice Thomas joined a dissent ridiculing the test and saying it should not be applied, and Justice Thomas has consistently opposed the Lemon test ever since.

I wonder why it was so difficult for Judge Roberts simply to say, ''Yes, in hindsight, I personally believe that Franklin v. Gwinnett was correctly decided, and that victims of intentional sex discrimination in educational programs do have a right to relief under title IX.'' Why was that so difficult an answer for Judge Roberts to give? Could it be that it was contrary to his view of the rule of law?

Judge Roberts's record is also one of consistent and long-standing opposition to affirmative action. In the 1980s, he urged the Reagan administration to oppose affirmative action. In the 1990s, in the administration of the first President Bush, he urged the Supreme Court to overturn a Federal affirmative action program. In private practice in the late 1990s and as recently as 2001, he litigated cases challenging affirmative action. That includes his repeated challenges to the Department of Transportation's disadvantaged business enterprise program, which has been upheld by every court that has reviewed it, and endorsed overwhelmingly by bipartisan majorities in the House and Senate.

On affirmative action, his view of the rule of law seems to be that established court precedents have little meaning, even though they have been found again and again to advance our progress on civil rights.

In 1981, he advocated abolishing race- and gender-conscious remedies for discrimination, although he admitted this position was in ''tension'' with the Supreme Court's opinion in United Steelworkers of America v. Weber, upholding affirmative action in employment—a case that had been decided only 2 years earlier. He wrote that the

administration did not see that opinion—Supreme Court opinion—as a ''guiding principle.''

In the same memos dealing with the Weber decision, Judge Roberts even suggested that the opinion might be overturned because of changes in the Court's composition.

Given his long and consistent opposition to affirmative action, Senators were entitled to seek some reassurance from the nominee that he would not use the power of the Chief Justice to continue his past efforts to end affirmative action.

I asked Judge Roberts:

Do you agree then with Justice O'Connor, writing for the majority, who gave great weight to the real-world impact of affirmative action policies in universities?

He stated:

I can certainly say that I do think that that is the appropriate approach, without commenting on the outcome or the judgment in a particular case. But you do need to look at the real-world impact in this area, and I think in other areas as well.

So he thinks that we should consider real world impact, but he never stated whether he agreed with Justice O'Connor that the University of Michigan case was correctly decided. On that issue, we don't know any more than we did before the hearing.

Senator FEINSTEIN also asked Judge Roberts his views on affirmative action, but he avoided her question as well. She asked, Do you personally subscribe, not to quotas, but to measured efforts that can withstand strict scrutiny?'' Judge Roberts replied, ''A measured effort that can withstand strict scrutiny is . . . a very positive approach.'' Well, that sounds as though he agrees, but then he also said, ''And I think people will disagree about exactly what the details should be.''

When Senator FEINSTEIN stated she specifically wanted to know his view of Grutter v. Bollinger, the University of Michigan case upholding affirmative action, Judge Roberts gave a long—answer that was no answer at all. ''In the Michigan case, obviously, you have I always forget whether it's the law school—but I think the law school program was upheld and the university program was struck down because of the differences in the program. But efforts to ensure the full participation in all aspects of our society by people, without regard to their race, ethnicity, gender, religious beliefs, all those are efforts that I think are appropriate.''

But of course, Senator FEINSTEIN had not asked about efforts to ensure participation without regard to race. She asked his view on a particular affirmative action program at the University of Michigan Law School that took race into account. We still do not know whether he agrees with that important Supreme Court decision. His refusal to tell us is very troubling.

I ask unanimous consent for 5 additional minutes.

Mr. BENNETT. Mr. President, I shall not object, but the junior Senator from Massachusetts is looking for time and we are anxious to get on to the bill. I will not object to the request for an additional 5 minutes, but I hope the Senator could, in fact, finish in that 5-minute time.

Mr. KENNEDY. I will try and do it in a shorter time.

I am also troubled by Judge Roberts' refusal to distance himself from his past criticism of the very important Supreme Court decision Plyler v. Doe that held that the basic principle of equal protection requires all school-age children to have the same access to public education, including the children of undocumented immigrants. In a very real sense, the Plyler decision is as important to the children of undocumented workers as the Brown decision is to African-American children. Yet Judge Roberts strongly criticized the decision. On the day the case was decided, he coauthored a memo criticizing the Solicitor General's office for failing to file a brief, arguing that these children could be denied public education.

Senator DURBIN asked Judge Roberts:

Did you agree with the decision . . . then? Or do you agree with the decision now?

Judge Roberts avoided the question, saying:

I haven't looked at the decision in the Plyler v. Doe in 23 years.

Senator DURBIN asked:

Is this settled law, as far as you are concerned, about our commitment in education . . . ?

Judge Roberts avoided this, saying he had not looked at the case recently, and that when he wrote the memo he was doing his job.

So we are left with nothing to reassure us he has changed his mind from his harsh criticism of that opinion in the past. His many statements of support for the rule of law yield no clue about his true convictions on this important question today.

Finally, a number of my colleagues on the committee asked Judge Roberts about issues related to women's rights, women's right to privacy. On these important matters, too, he never gave answers that shed light on his current views.

No one is entitled to become Chief Justice of the United States. The confirmation of nominees to our courts, by and with the advice of the Senate, should not require a leap of faith. Nominees must earn their confirmation by providing full knowledge of the values and convictions they will bring to the decisions that may profoundly affect our progress as a nation toward the ideal of equality.

Judge Roberts has not done so. His repeated allegiance to the rule of law reveals little about the values he would bring to the job of Chief Justice of the United States. The record we have puts at serious risk the progress we have made toward our common American vision of equality of opportunity for all of our citizens.

Supporting or opposing nominees in the Supreme Court should not be a partisan issue. In my 43 years in the Senate, I have supported more nominees for the Supreme Court by Republican Presidents than by Democratic Presidents, but there is clear and convincing evidence that Judge Roberts is the wrong choice for Chief Justice.

I oppose the nomination. I urge my colleagues to do the same.

Mr. BENNETT. Mr. President, the order now is that we go to the Agriculture appropriations bill. I ask unanimous consent the junior Senator from Massachusetts be allowed to speak for 15 minutes as in morning business.

The PRESIDING OFFICER (Mr. GRAHAM). Without objection, it is so ordered.

The Senator from Massachusetts.

Mr. KERRY. Mr. President, we all know there are few things the Senate does which are as important as confirming a Supreme Court Justice, let alone the Chief Justice of the United States. We know that making the decision to support or oppose the nomination is both serious and complicated. We do not need to belabor those points.

What we do need to talk about is what kind of process ought to occur, must occur, before a Senator can vote for or against a judicial nominee. What kind of information should be provided? What kind of discourse should we engage in?

I met with Judge Roberts last week. I must say I enjoyed our conversation enormously. He is earnest, friendly, incredibly intelligent, and on a personal level I liked him. He has dedicated his life to the law, has given back to the legal community, and is certainly beyond question a superb lawyer. It may turn out he will be an outstanding Chief Justice. But I can't say with confidence that I know on a sufficient number of critical constitutional issues how he would rule or what his legal approach would be. I have read memos he wrote during the Reagan administration. I have reviewed the limited materials available from his time in the Solicitor General's office, where he worked under Ken Starr, and then in private practice at Hogan and Hartson. I have read the cases he participated in on the DC Circuit. I have listened to as much of the Judiciary Committee hearings as I could and I have reviewed transcripts where I couldn't.

After all of that, I still find something essential is missing, something critical to our democratic process, something to ensure that we have an appropriate understanding of both our courts and our judges and their role in America. That understanding requires a genuine exchange of information and a real development of ideas, similar, in fact, to that which occurs in every argument at the Supreme Court itself or in the appellate courts.

In appellate arguments, judges and Justices question lawyers, probing the depth of their legal arguments, testing their particular legal argument against

the court's, or determining how it fits into their interpretation of the Constitution. They determine how interpretive principles apply and how they can reconcile apparently conflicting arguments. They make a judgment about the consequences of a potential outcome. The result in the end is a better understanding of the record before the court and, hopefully, a principled approach to deciding the case.

Judge Roberts' Judiciary Committee hearings, notwithstanding the efforts of the Chair and many other of the Senators partaking in it, continue an increasingly sterile confirmation process: little genuine legal engagement between the questioners and the questioned, no real exchange of information, and too little substantive discussion. The confirmation exercise has now become little more than an empty shell. People are left guessing, hoping they understand the nominee's positions.

The administration's steadfast refusal to disclose documents Judge Roberts worked on while serving as a Deputy Solicitor General in the first Bush administration has only compounded this problem. They claim disclosure of the documents will violate attorney-client privilege. I find that argument absurd. What client are they trying to protect? The Solicitor General represents the people of the United States of America. He is charged with arguing cases on behalf of all Americans. We were Judge Roberts' client when he worked in the Solicitor General's office. We have a right to know what he thought about the arguments he made on behalf of the American people.

When John Roberts served as a Deputy Solicitor General under Ken Starr, he was intimately involved in critical decisions that office made, such as whether to intervene in a pending case; what legal arguments to advance in support of their position; whether to push for Supreme Court review; what the consequences of those arguments or that action would be; how those arguments fit into their theory of constitutional interpretation, whether those arguments reflect the views of the American people—all of these decisions are critical to an individual's thinking, to their approach to the law, to their understanding of public trust and public responsibility, to their understanding of the Constitution itself. All of these decisions helped to shape how Federal law was applied and how our Constitution was interpreted during that period of time.

The fact is, there are bureaucrats, none of whom take an oath, as we do, to uphold the Constitution, who are aware of the contents of those particular memoranda. Yet we, the Senators, who are constitutionally obligated to give consent to this nominee, still do not know what positions Judge Roberts took, the arguments he made, or the thinking behind those arguments.

For example, the Solicitor General's office decided to intervene in Bray v. Alexandria Women's Health Clinic. That case was brought against abortion clinic protesters during the height of clinic violence and bombings. The plaintiffs argued that protesters were violating a Federal antidiscrimination law by blocking access to clinics and inciting violence. The Government intervened and argued that the Federal antidiscrimination law did not apply and, therefore, could not be used to stop the protesters.

Judge Roberts briefed and argued the case for the Government. I believe the arguments advanced by the Government and the consequences of those arguments are troubling, but what we do not know is even more important: What role did Judge Roberts play in making them? What did he think about that approach? Did he consider the consequences on life, limb, and individual? Did he argue for a more narrow or broad interpretation of the law?

At the same time, the Solicitor General's office intervened in a district court case in Wichita, KS, which raised the same issues that the Supreme Court in Bray was facing. The Government tried to get the district court to lift an injunction put in place to protect the safety of the clinic workers and patients. They argued that the plaintiffs could not win and, therefore, the injunction was improper. The district court denied the Government's request and chastised it for unnecessarily endangering people's lives. Those are the real consequences. We ought to know what kind of thinking, what were the legal approaches to the protection of those individuals' lives.

The question still remains, what role did Judge Roberts have in making that decision? What was the legal reasoning that prompted it? Did he consider the real-life dangers that would result from that legal argument?

The Solicitor General's office is never obligated to intervene in private litigation. There are thousands of cases pending every day like these questions. Why did the Government choose to intervene in those particular cases? And, even more importantly, what role did Judge Roberts have in making that decision?

The administration's refusal to disclose those documents, in my judgment, creates a serious roadblock in the Senate's ability to properly evaluate Judge Roberts. But Judge Roberts' refusal to genuinely engage in the confirmation hearings, answer legitimate questions, or at least shed light on them creates a bigger one.

I understand a Supreme Court nominee cannot answer questions about a case in controversy, cannot answer questions about a case that may well come before him, and I understand that he can't promise to resolve a future case in a particular way. I am not asking him to do that. I don't expect that to be the standard of the hearings.

But that does not mean you can't discuss the principles of decided cases and whether you agree with them. What legal principles do you bring to the job? It doesn't mean you should refuse to disclose an approach to constitutional analysis. It doesn't mean you should do nothing more than recite the status of current Supreme Court case law.

This is not the first time the Supreme Court nominees have refused to engage in that kind of meaningful discourse. Justice Souter refused to answer fundamental questions about his judicial philosophy. For that reason I voted against him at that time. I am happy to say I have been surprised, and pleasantly, that my concerns did not come to pass. Justice Thomas also refused to answer fundamental questions about judicial philosophy. As I said at the time, Justice Thomas found a lot of ways to say ''I don't know'' or ''I disagree'' or ''I cannot agree'' or ''I can't say whether I agree.'' I voted against Justice Thomas because again I didn't know what the end product was going to be. I believe I was correct in making that decision.

At the end of the day I find myself in the same position I was with both of these Justices. Notwithstanding Judge Roberts' impressive legal résumé, I can't say with confidence that I know what specific constitutional approach he believes in or what kind of Chief Justice he will be. Will he protect the civil rights and civil liberties we fought for so long and hard, which he acknowledged in the course of the hearings? Will he support the power of Congress to enact critical environmental legislation? Will he be an effective check on executive branch actions? In my judgment, before you vote for Chief Justice, particularly one who may lead a court for potentially 30 years or more, we ought to know the answers to those fundamental questions. In the case of Judge Roberts, we don't.

For example, I don't know how Judge Roberts will approach cases challenging the power of Congress to enact vital national legislation. I understand that terms such as the ''Commerce Clause,'' ''Section 5 of the 14th Amendment,'' and ''Spending Clause'' don't mean a lot to everybody in the country on a daily basis. But however technical and legalistic the discussion of those terms may be, they are critical to us in our judgments as Senators about how our Government functions. A Justice with a limited view of congressional power will undermine Congress's ability to respond to national problems.

For example, under the commerce clause, Congress can only regulate things that affect interstate commerce. When Congress enacted the Violence Against Women Act in 1996, it made numerous very specific findings about how that violence affected interstate commerce. The Court found those findings insufficient and struck down that piece of legislation.

When asked by Senator SPECTER whether he agreed with the Court in this case, Judge Roberts refused to answer. When asked whether he would

have found similar congressional findings insufficient, Judge Roberts refused to answer. I believe those answers ought to have been forthcoming, particularly when they address how Judge Roberts would interpret Congress's fundamental constitutional powers.

Judge Roberts has shed some light himself on his view of the commerce clause because he wrote about it in a dissenting opinion on the DC Circuit. In Rancho Viejo v. Norton, the so-called ''hapless toad case,'' Roberts suggested that the Endangered Species Act, as applied to the California toads at issue, might be unconstitutional because they had an insufficient connection to interstate commerce.

He also suggested there might be other ways of looking at the case to preserve the act's constitutionality. When asked about it during the hearings, and again personally in my own meeting with him, Judge Roberts did not endorse one view or the other. He gave no sense of how he might interpret Congress's power and its limitations.

While his refusal to completely condemn the Endangered Species Act was obviously somewhat reassuring, at the end of the day, I am left without any real understanding of how he would approach a commerce clause question. I have no idea whether he will undermine Congress's ability to pass needed legislation. I have no idea how he will approach challenges to existing Federal environmental laws, such as the Endangered Species Act. Which of the possible approaches he laid out in Rancho Viejo does he believe is the most correct? This certainly creates a risk I personally am unwilling to accept when voting to confirm the next Chief Justice of the United States.

Another area of great concern to me is obviously the area of privacy, an area where Judge Roberts skillfully answered a lot of questions without giving a hint as to his own position. For example, while Roberts admitted that the Court has recognized that privacy is protected under the Constitution as part of the liberty in the due process clause, he refused to give any indication of what he thought about the Court's most recent decisions.

The furthest he went was to say he had no quarrel with the decisions in Griswold and Eisenstadt, yet this kind of endorsement is not reassuring. In his confirmation hearings, Justice Thomas agreed that the Court had found a constitutional right to privacy. Like Judge Roberts, he also stated he had no quarrel with the Court's holding in Eisenstadt. Yet when he got to the Supreme Court, he disavowed the very rights he had said the Constitution protected.

In fact, more recently in Lawrence v. Texas, Justice Thomas stated he could not ''find [neither in the Bill of Rights nor any other part of the Constitution a] general right of privacy.'' The bottom line is I do not know how Judge Roberts will approach those questions with respect to the fundamental right of privacy.

In addition to what I do not know, what I do know about Judge Roberts also raises issues. I know in the early 1980s, while he worked in the Department of Justice and White House Counsel's Office, Judge Roberts took an active role in advocating on behalf of administration policies that would have greatly undermined our civil rights and liberties.

Mr. President, how much time do I have remaining?

The PRESIDING OFFICER. The Senator's time has expired.

Mr. KERRY. Mr. President, may I ask for an additional few minutes? Thank you.

For example, Judge Roberts argued against using the ''effects test'' to determine whether section 2 of the Voting Rights Act was violated. Instead, he believed that an ''intent'' test—requiring proof of a discriminatory motive—should be required, regardless of the fact that many victims of discrimination would be absolutely unable to prove a real discriminatory intent and, therefore, would be unable to enjoy the protections afforded by the act. In some cases, the effect of Judge Roberts' intent test meant that disenfranchised individuals had to prove the motive of long dead officials who had crafted the legislation. Obviously, that is impossible. So he would have set up an unacceptable standard, one that would come between citizens and their constitutionally protected right to fair representation in our democracy.

Judge Roberts also argued that the obligations imposed on educational institutions by title IX should apply only to the specific program that received Federal funding rather than to the whole institution. Again, by limiting the application of an important anti-discrimination law, there is an effect, which is to deny people their constitutional right.

In the area of affirmative action, Judge Roberts argued in favor of limiting race-conscious remedies to instances where individuals were proven to be the victims of identifiable acts of impermissible discrimination.

I realize Judge Roberts took the positions I just described some time ago. I know he told the Judiciary Committee he was simply advocating the views of the administration at the time. But I think those of us who have worked in and around Government for a period of time find it hard to believe that a staffer at Justice or in the White House never wrote a memo that represented some of his views rather than just administration positions, particularly when the theme of those memos is consistent across the board—strict adherence to narrow principles of law despite their real-world impact, and particularly when some of the memos released from this time include acknowledgements by Judge Roberts that his own position failed to prevail in the internal deliberations.

That was certainly true when he argued, unsuccessfully, within the administration that Congress could strip the Federal courts of jurisdiction over abortion and desegregation cases.

I will conclude, Mr. President. I do not want to abuse the Senator's permissiveness here. Let me close with this particular argument.

Judge Roberts' more recent decision to join to Judge Randolph's opinion in Hamdan v. Rumsfeld is important with respect to the security consequences regarding the military and our soldiers. That opinion gave the President unfettered and unreviewable authority to place captured individuals outside the protections of the Geneva Convention. Six retired senior military officials with extensive experience in legal policy, the laws of war, and armed conflict, have filed a friend-of-the-court brief in the Supreme Court, arguing that Hamdan must be overturned immediately because it directly endangers American soldiers. These are the real effects of these rigid applications of law.

I understand that Judge Roberts felt he could not discuss the case while it was pending before the Supreme Court, but even when asked about his views of the scope of executive power unrelated to the Hamdan case, he was evasive. He did little more than describe the Court's current framework for analyzing assertions of executive power.

As a result, I do not know whether he believes that the state of war is a blank check for the President or whether he would closely scrutinize the legality of executive branch actions at all times. Given the fact that the Hamdan decision placed our troops at risk, I am forced to conclude that some of his future decisions might threaten the security of troops abroad and our security at home.

Now, some may argue that Democrats ought to vote for Judge Roberts because he is the best nominee we could expect from the administration. I cannot agree to confirm the next Chief Justice of the United States simply because the next nominee to the Court may be less protective of our fundamental rights or liberties or less dangerous to national security. Frankly, I am not sure how I would make that determination given the limited record before me.

Some may argue that Democrats should vote for Judge Roberts because of his resume. He obviously is qualified in terms of his legal education and litigation experience. But I do not think that should be the test. A Supreme Court Justice needs more qualifications than an impressive legal resume. They need compassion and sensitivity. They need a clarity with respect to their approach to the Constitution. They need an understanding of the consequences of their decisions and how they further democratic traditions.

As a Senator, I am duty bound to consider each nominee as an individual and how he or she will fit into the current Court—the current closely divided

Supreme Court. I have a duty to protect the fundamental rights I believe our Constitution guarantees. I have a duty to preserve the incredible progress that has been made toward the realization of those rights for Americans. I have a duty to safeguard our national security, and to prevent the executive from using war as a blank check to violate both national and international law.

John Roberts will be confirmed. I hope and look forward to decisions that will allay all of my concerns. He may author or join opinions protecting the rights which we hold so dear, and in so doing he may prove all of my concerns to be groundless. I hope so. But the questions I have raised, the absence of critical documents, the lack of clarity surrounding fundamental issues on how he would interpret the Constitution, requires me to fulfill my constitutional duty by opposing his nomination to be the next Chief Justice.

I thank the Chair again, and I thank the Senator for his courtesy.

CONCLUSION OF MORNING BUSINESS

The PRESIDING OFFICER. Morning business is closed.

AGRICULTURE, RURAL DEVELOPMENT, FOOD AND DRUG ADMINISTRATION, AND RELATED AGENCIES APPROPRIATIONS ACT, 2006

The PRESIDING OFFICER. Under the previous order, the Senate will resume consideration of H.R. 2744, which the clerk will report.

The legislative clerk read as follows:

A bill (H.R. 2744) making appropriations for Agriculture, Rural Development, Food and Drug Administration, and Related Agencies for the fiscal year ending September 30, 2006, and for other purposes.

The PRESIDING OFFICER (Ms. MURKOWSKI). The Senator from Utah.

NOMINATION OF JOHN ROBERTS TO BE CHIEF JUSTICE

Mr. BENNETT. Madam President, we are on the Agriculture bill, but the morning has been taken up with discussion of Judge Roberts. I think that is appropriate given the decision of the ranking member of the Judiciary Committee, Senator LEAHY, to support Judge Roberts and to announce that here this morning. That was perhaps unexpected by some of the commentators and, therefore, deserved a little time.

I will take the opportunity, having listened to the junior Senator from Massachusetts, to respond to some of the things he said, not with the understanding that it is going to change anything anywhere but for the satisfaction of getting a few things off my chest.

The Senator complained bitterly, as he and others have done with respect to other nominees, that the memos given to the Solicitor General are not being made public. He did not tell us that every Solicitor General—regardless of party, regardless of administration—who is currently living has agreed with Judge Roberts, with Miguel Estrada, with others who worked in the Office of the Solicitor General, that those memos should, in fact, not be made public.

They are, in fact, covered by the attorney-client privilege. Some say, ''Well, the American people are the client, not the Solicitor General.'' The Solicitor General is the attorney for the American people and has a right to attorney-client privilege within his own staff, as any attorney has for material within that attorney's own office, as if they are representing a private client.

This keeps coming up. It keeps being repeated in the hope that it catches on. We need to always remember that every single Solicitor General who is living—regardless of their party—says that is the bad thing to do. That is the wrong interpretation of the law. The Senator from Massachusetts did not point that out. I think it needs to be pointed out.

He made a reference to the bureaucrats who were involved here who, as he said, have not taken an oath to defend the Constitution as we Senators have. I have been a bureaucrat. I have taken an oath as a bureaucrat to defend the Constitution. Those who serve the United States in these positions are sworn in with the same oath Senators take. It should be made clear those people who took that position and were in that position were, in fact, under oath to defend the Constitution. It demeans them to suggest their actions were any less patriotic or anxious to protect the law than actions of Senators.

I will conclude by quoting from an editorial that appeared in the Los Angeles Times. The Los Angeles Times is not known as a paper supportive of Republican positions. Indeed, it is often thought of as being a companion publication with the New York Times. But the Los Angeles Times says:

It will be a damning indictment of petty partisanship in Washington if an overwhelming majority of the Senate does not vote to confirm John G. Roberts Jr. to be the next chief justice of the United States.

As last week's confirmation hearings made clear, Roberts is an exceptionally qualified nominee, well within the mainstream of American legal thought, who deserves broad bipartisan support. If a majority of Democrats in the Senate vote against Roberts, they will reveal themselves as nothing more than self-defeating obstructionists. . . .

Even if one treats this vote merely as a tactical game, voting against an impressive, relatively moderate nominee hardly strengthens the Democrats' leverage [on the upcoming second nomination].

If Roberts fails to win their support, Bush may justifiably conclude that he needn't even bother trying to find a justice palatable to the center. And if Bush next nominates someone who is genuinely unacceptable to most Americans, it will be harder for Democrats to point that out if they cry wolf over Roberts.

I am not sure that will change anything, but it makes me feel a little better having said it, after listening to the presentations we have heard over the last hour. I congratulate my friend, Senator LEAHY from Vermont, for his courage in standing up to internal pressures and his announcement that he will, following the advice of the Los Angeles Times and others who have examined this, in fact vote to confirm Judge Roberts. This guarantees that we will have a bipartisan vote out of committee, as we should, and that we will have strong bipartisan support here on the floor, as we should.

AMENDMENT NO. 1783

Returning to the Agriculture appropriations bill, I send an amendment to the desk.

The PRESIDING OFFICER. The clerk will report.

The legislative clerk read as follows:

The Senator from Utah [Mr. BENNETT] proposes an amendment numbered 1783.

Mr. BENNETT. I ask unanimous consent that reading of the amendment be dispensed with.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment is as follows:

On page 173, at the end of the page, insert the following:

''SEC. 7____. (a) Notwithstanding subtitles B and C of the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4501 et seq.), during fiscal year 2006, the National Dairy Promotion and Research Board may obligate and expend funds for any activity to improve the environment and public health.

''(b) The Secretary of Agriculture shall review the impact of any expenditures under subsection (a) and include the review in the 2007 report of the Secretary to Congress on the dairy promotion program established under subtitle B of the Dairy Production Stabilization Act of 1983 (7 U.S.C. 4501 et seq.).''.

Mr. BENNETT. Madam President, we need a little background on this amendment. It may be controversial. I understand there are some Senators who have opposed it and will be coming to the floor.

It would allow the producers on the National Dairy Promotion and Research Board to vote to fund or not fund the dairy air emission research required under the Environmental Protection Agency's Air Quality Compliance Agreement. This sounds fairly technical. In fact, the money that is available to the board has always been used for particular purposes, and most dairy producers want to make sure that it stays restricted to those purposes. But something has come up that requires research. It has come not from the Department of Agriculture but from the Environmental Protection Agency in a new agreement that affects dairy farmers. And in order to defend themselves against the position taken by the EPA, they need research. They need it now, and they need it badly.

This amendment would allow a one-time use of dairy promotion and research funds to fund the research. Most